Filed 8/3/10 In re K.K. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re K.K., et al., Persons Coming Under the Dependency Court Law.	B219322, B219427, B222013 (Los Angeles County Super. Ct. No. CK68909)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CANDACE K., Defendant and Appellant.	

APPEALS from Orders of the Superior Court of Los Angeles County. Sherri Sobel, Juvenile Court Referee. Reversed with directions.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Deputy County Counsel, for Plaintiff and Respondent.

Mother Candace K. appeals three dependency court orders regarding her three-year old twin sons Ko.K and K.K. (the Twins) and her infant son K.K. (Son). She appeals the orders (1) terminating her parental rights to the Twins (No. B219427), (2) detaining Son and denying her reunification services (No. B219332), and (3) terminating her parental rights to Son (No. B222013).[1] Mother contends the notice requirements of the Indian Child Welfare Act (ICWA) were not followed as to all children. She also contends the dependency court erred in sustaining the petition regarding Son under Welfare & Institutions Code section 300, subdivision (b),[2] and in ordering that he be removed from her custody, denying reunification services, and terminating her parental rights to him. Mother fails to show any error except that the Department failed to comply with the notice requirements of ICWA; in that regard, we reverse with a limited remand to permit the Department to comply with ICWA.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Proceedings Regarding the Twins

In June 2007, the Los Angeles County Department of Children and Family Services (the Department) detained the Twins and their older sister M.J. after Mother took the five-month old Twins to a medical facility and said she wanted to give them up for adoption. Mother was extremely distraught, had a recent, two-inch scar on her forehead, and admitted the Twins' father (Father R.) had hit her. She stated he hit her on three previous occasions. Mother also admitted some domestic violence had previously occurred involving M.J.'s father (Father J.). Mother denied that the Twins or M.J. were present when Father R. hit her. Sheriff's deputies told the social worker at the time of detention Mother did not appear stable enough to have the children in her care.

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[1] Appeal Nos. B219427, B219322, and B222013 pertaining to these three orders have been consolidated for purposes of hearing and decision.

[2] All statutory references herein are to the Welfare & Institutions Code unless otherwise noted.

The next day, the Department's social worker visited Mother in her home and observed that she had not changed clothing from the prior day, had a flat, depressed affect, and when asked questions did not appear to understand, and stared at the social worker without answering. Mother was reported to have engaged in frequent acts of domestic violence with Father R. and Father J., and would become depressed after they beat her up. The Department was concerned that mother would make impulsive decisions that would harm the children.

The petition filed June 25, 2007 alleged jurisdiction under section 300, subdivision (a), (b), and (g), and at the detention hearing the court ordered M.R. and the Twins be detained and placed in foster care. The jurisdiction report stated that Mother had engaged in violent altercations with Father R. in the presence of M.R., Mother suffered from mental and emotional problems, including chronic depression and paranoid behavior, and Mother's mental and emotional problems endangered the children's well being and placed them at risk of harm. As a result of her abusive childhood, Mother feared that the children would be abused if left in the care of anyone other than herself. The jurisdictional report chronicled numerous incidents of domestic violence between Mother and Father J. and Father R. as far back as December 2003. In February, March and May 2007, as a result of domestic violence between Mother and Father R., Mother sustained scratches on her face and neck and swelling on her mouth and eyes.

An interim review report prepared for the continued jurisdictional hearing of August 1, 2007 stated that during visitation with M.R., Mother made allegations that M.R. had been sexually abused, and examined the child's body and private parts during visits. The Department recommended a more restrictive visitation setting until Mother could resolve her paranoid behavior, and a psychiatric evaluation of Mother. A second report prepared for the August 31, 2007 hearing stated that Father J., who was with Mother from 1997 to 2004, had told the Department on occasion Mother had hit him in the head with a stick, broken a window, pulled his hair, and repeatedly hit and kicked him. Mother had gotten a black eye from a fight with her landlord. Father R. stated that

Mother had stabbed him with an ice pick, hit him, and pulled out knives on him. He claimed that he hit Mother in self-defense.

Mother was arrested on August 12, 2007 for hitting the Father R. on the head with a hammer.

At the jurisdictional hearing on August 31, 2007, Father J. testified that Mother had instigated many incidents of domestic violence against him during the years they were together up to 2003, but they did not fight around the children. Father R. testified Mother had hit him over the head with a bottle, stabbed him with an ice pick, threatened him with a knife, and hit him on the head with a hammer while he slept. The dependency court ordered Mother to undergo an Evidence Code section 730 psychological evaluation.

At the adjudication hearing on September 27, 2007, Mother admitted hitting Father R. in the head with a hammer. The court found Mother was seriously disturbed and heavily involved in domestic violence, commenting, "You never know when the ice pick is going to come out." "She's like mercury. She's here one day; she's gone the next." The court sustained the (b)(1) and (b)(3) allegations of the petition as amended, and struck the (b)(2), (b)(4), (b)(5) and (b)(6) allegations. The court ordered Mother to attend parenting classes, individual counseling, and a domestic violence intervention program and undergo a psychiatric evaluation.

Over the next year and a half, Mother made no effort to follow the reunification plan. She visited the children only sporadically and failed to enroll in any court-ordered programs or undergo a psychiatric examination. She acted inappropriately during her few visits, making unfounded allegations of abuse against the foster caregivers. The Department reported that Mother was unwilling to seek help or have a psychiatric evaluation. On March 13, 2008, the court terminated Mother's reunification services.

A status review report dated August 25, 2008 stated that Mother had not visited the children since March 20, 2008, at which time she had been escorted out of the office for arguing with social workers in front of the children. In July 2008, Mother was arrested for assault after attacking an elderly neighbor. After kicking the neighbor, Mother ran back into her house and returned with a knife.

On February 17, 2009, the dependency court terminated jurisdiction over M.R., gave Father R. father sole legal and physical custody, and granted Mother monitored visits once per month.

The court terminated Mother's parental rights to the Twins on September 24, 2009.

2. Proceedings Relating to Son

Son was born in May, 2009.[3] He came to the attention of the department on June 15, 2009, when Mother brought him to a hearing regarding the Twins. The Department detained Son. The detention report noted that Son was well-cared for and physically clean, the home was clean, and Mother had all necessities for the child. On June 23, 2009, the Department filed a petition on Son's behalf, alleging one subdivision (b) count, as follows: Mother "has mental and emotional problems, including violent assaultive behavior, which render the mother unable to provide regular care for the child. The mother failed to participate in a Dependency Court ordered psychiatric evaluation, individual counseling, and psychiatric consultations. The child's siblings [the Twins] are receiving permanent placement services due to the mother's mental and emotional problems. Such mental and emotional problems on the part of mother endanger the child's physical and emotional health and safety and place the child at risk of physical and emotional harm and damage." The social worker explained to Mother that Son was being detained because she did not reunify with her other children or complete court-ordered programs, including a mental health evaluation.

In the detention report, the department noted Mother had made no efforts to comply with her case plans. Specifically, Mother had made no effort to curb her violent tendencies, and a police officer was quoted as saying, "We all know [Mother]. We come [to her home] all the time. There have been problems between [Mother] and a neighbor, for constant domestic disputes. The neighbor moved away and [Mother] lives here with her mother. We have responded to this situation between [Mother] and the neighbor, at

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[3] The identity of Son's father is unknown.

least ten times this past year." Mother told the social worker at a Team Decision Meeting that her past issues would not affect her care of Son; she had not enrolled in her programs because the court had terminated them, she had no funds, and there was no need for the services; and her mental health issues existed because she was distraught over the loss of her children. Maternal grandmother told the Department that Mother and Son were living in her home.

At the detention hearing, the dependency court found that Mother had previously complied "not one iota" with case plans regarding M.R. or the Twins and ordered that Son be detained.

The July 14, 2009 jurisdiction and disposition report stated that Mother had spat in a police officer's face in connection with her recent arrest, and denied she had mental health problems, contending she received a psychiatric evaluation. Mother submitted a letter to the court from William Wirshing, M.D., in which he provided a "[p]sychiatric [e]valuation [s]ummary" regarding Mother. Dr. Wirshing found Mother did not suffer from any "functionally limiting major psychiatric condition," though she did have problems with authority and anger management. She had a mildly narcissistic character and was suffering from post traumatic stress syndrome, but this did not compromise her ability to function as a parent. Dr. Wirshing concluded no psychiatric reason existed why Mother could not parent her children.

The Department, however, noted that Dr. Wirshing had admitted to the social worker that he did not conduct any psychological testing of Mother and had never treated her. The Department reiterated in its jurisdiction report that Mother needed formal psychiatric evaluation and a clinical diagnosis. "The fact that [Mother] has no history of treatment has serious implications for the child's safety especially when the mother continues to demonstrate out of control anger and violent behavior." Further, Mother had little insight into her own behavior and how to rectify it.

The Department further reported that Mother had begun parenting and domestic violence classes and had undergone a section 730 evaluation, but she admitted the evaluation results were not turned over to the dependency court because they reflected

poorly upon her. Mother also admitted she spat in a police officer's face while under arrest for a prior assault. When Mother visited Son at a foster agency, she had to be removed after becoming hostile and belligerent. On July 2, 2009, when Son was hospitalized, Mother visited him but was escorted out by security after she got into verbal altercations with Son's foster parents. Son's foster parents reported Mother called them frequently, as often as seven times a day, asking about Son, but during visitation at DCFS's offices she ran into another room, stating she was afraid of the foster father. A DCFS social worker reported that whenever he talked to Mother he could "see her slowly start to escalate and get angry."

For the continued jurisdictional hearing on August 12, 2009, Mother's case manager at Total Family Support Agency in Long Beach reported that Mother came in for treatment every day for both group and individual counseling and parenting classes. The program addressed anger management, domestic violence, alcoholism, and Mother's past marijuana use. But the case manager stated: "I can tell you right now that her level of comprehending what's going on is very limited. It's never her fault. She told me that DCFS took her kids away for no reason. She says that no one lets her see her kids. She has been in unhealthy relationships and she mentioned she has a sexual addiction. She told me that and admitted that it's destroying her and a problem for her."

When visiting the foster agency, Mother was at times deceptive, belligerent, loud and erratic. She walked the halls, demanding to see a case worker and accusing the receptionist of hiding him. When she met him, she said she was afraid of him and of the foster father, falsely claiming the foster father was violent. The case worker reported Mother had collected benefits intended for the foster family and speculated that the state would pursue fraud charges against her.

The Department concluded Mother "continues to demonstrate out of control anger. . . . She has been violent toward her male companions and also has a record for battery on a peace officer. Although she may not have any serious psychiatric disorders as her psychiatrist points out, she has enough problems with her behavior to show good cause for concern. [¶] First and foremost, the mother is almost always confrontational

with the people who are servicing the case and the children. Although the mother is now in a counseling program it appears that she is not benefiting from it as stated by her therapist . . . . The mother constantly refused to take responsibility for her behavior, blames others for her situation and has only begun to participate in therapy after having a long history with DCFS and the minor's siblings. [¶] The above witnesses[']statements indicate[] that the mother's anger continues to be a problem[]. Mother needs to show long term participation in counseling with an ability to gain insight into her behavior and how that [a]ffects [Son]. . . . Presently[,] the mother is very entrenched in denial and does not appear to be a good candidate for therapy."

The Department recommended that Mother not receive reunification services.

At the August 12, 2009 jurisdictional hearing, a dependency investigator testified she did not believe Mother had begun to resolve her problems with anger or had gained insight into the problem. "It's more than one incident. In fact, it's multiple incidents where there's some kind of verbal angry confrontational problem with staff, be it foster care agency staff, foster parents and monitors, receptionists at the foster care agency. You know, it's always, always the same thread that runs through this case. It's anger. And that's what appears to not be resolved as of yet." The investigator admitted Mother had not abused or neglected Son or told anyone she could not care for him, and her behavior, though it affected every other aspect of her life, did not directly affect Son. Mother visited Son consistently and acted appropriately with him.

Mother testified that she continued to see Dr. Wirshing and her counselor and was involved in drug education, individual counseling, domestic violence counseling, relapse prevention counseling, parenting classes, and group therapy. She admitted she had not solved her anger management issues or completed parenting classes, but intended to continue with counseling "as long as it takes."

The court commented that a recent unpublished decision, *In re K.T.K.* (Aug. 11, 2009, No. B208756 [nonpub. opn.]), which was factually similar to Mother's case, found no jurisdiction under section 300, subdivision (b) because "there was no evidence the children had suffered or were at substantial risk of suffering serious physical harm or

illness as a result of mother's actions."[4] In *In re K.T.K.*, the mother coerced her children into making false accusations against the father about abuse, and was "enmeshed" with them to the extent that she was emotionally unstable. However, there were no signs of physical abuse, and the dependency court found the subdivision (c) count inapplicable because the children, though experiencing "situational" anxiety, "were generally happy and healthy." The dependency court sustained what had been a subdivision (c) allegation as a subdivision (b) allegation. *In re K.T.K.* reversed, finding insufficient evidence to support the subdivision (b) allegation because the only harm alleged was emotional harm.

After referencing *In re K.T.K.*, the dependency court stated that "here we are in pretty much that precise fact pattern. I honestly cannot find that mother poses a substantial risk of physical danger. I don't think she's going to beat the baby. I don't think she's going to harm the baby. Do I think she poses an emotional risk? Do I think she poses a risk in general? Of course she does. [¶] We don't hand babies back to parents who are in severe life situations because they don't pose a substantial risk of physical harm."

The dependency court sustained the petition, finding Son to be described by subdivision (b) because "Mother has mental and emotional problems including violent, assaultive behavior which renders her unable to provide regular care for the child." The court found Mother posed "a regular, consistent, and constant danger to any child by virtue of her inability to maintain herself in the community. She fights with everybody. She physically fights with everybody. [¶] . . . [¶] [She] cannot control herself in the community in any way." Though the court found no risk of physical danger existed, it

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[4] Pursuant to California Rules of Court, rule 8.1115, subd. (a), courts and parties may not cite or rely on opinions that are unpublished, except where the opinion is relevant under the doctrine of law of the case, res judicata, and collateral estoppel, or is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action. (Cal. Rules Court, rule 8.1115, subds. (b)(1)&(2).) *In re K.T.K.* does not fall into either of these exceptions and is not proper authority. We set forth its facts and holding for the limited purpose of illustrating the dependency court's reasoning in making its ruling.

stated that return of Son to Mother would create a substantial risk of danger to his physical or emotional well being and that no reasonable means existed to protect him while in Mother's custody. Finally, pursuant to section 361.5, subdivision (b)(10), the dependency court ordered that no reunification services be provided because Mother had failed to make reasonable efforts to address the problems that led to removal of the Twins.

The December 8, 2009 section 366.26 report for Son's permanency planning hearing stated that he was likely to be adopted and recommended that Mother's parental rights be terminated. The adoptive parents' home study had been approved in March 2009. Son had been with them since birth and he was comfortable, happy and healthy in their home. Son's two visits with Mother in October and November 2009 had gone well. The Department recommended the dependency court terminate Mother's parental rights.

At the continued January 8, 2010 hearing, Mother testified that after Son's detention, she initially saw him on a daily basis, and then her visits dropped to three times a week. Currently, she was visiting him once a week because of the pending termination hearing and her failure to reunify. Mother claimed she was maintaining visitation according to schedule, and her interaction with Son went well. They would have their "morning cuddle," go through numbers and letters, look at cars outside the window, and sing songs. Son would smile and jump around, and was very happy. One time, he called her "Mom."

The Department argued that Mother's visits were monitored, and the once-a-week schedule had resulted from Mother's behavior. As a consequence, Mother only had a visitor's relationship with Son. The court observed, "I'm not sure how to get through to [Mother]. This is child No. 4. She was so disruptive in July [2009] that the Department had to actually call the authorities. . . . [A]t all times when she was dealing with the Department, she remained belligerent and fairly irrational. [¶] . . . [¶] There has been absolutely no information by way of a [section] 388 [petition] that this mother has in any way, shape, or form been able to alleviate the emotional disturbance and mental instabilities that required the removal of her other three children." The court found the

section 366.26, subdivision (c)(1)(B)(i) exception did not apply, that Son was adoptable, and terminated Mother's parental rights.

CONTENTIONS

Mother has filed three appeals, which we consolidated. In appeal No. B219427 she challenges the termination of her parental rights over the Twins on the sole ground that the Department and dependency court failed to comply with the notice requirements of the ICWA. In appeal Nos. B219322 and B222013, Mother argues the dependency court failed to follow the ICWA and that its orders asserting jurisdiction, removing Son from her custody, denying reunification services, and terminating her parental rights were not supported by substantial evidence. The Department concedes the ICWA was not followed and that reversal and limited remand is appropriate on that ground only.

DISCUSSION

I. SUSBSTANTIAL EVIDENCE SUPPORTS JURISDICTION OVER SON UNDER SUBDIVISION (b)

Mother contends insufficient evidence supported the dependency court's assertion of jurisdiction under subdivision (b) because there was no evidence she had abused or neglected Son. We disagree.

At the jurisdictional hearing, the dependency court's finding that a child is a person described in section 300 must be supported by a preponderance of the evidence. (§ 355, subd. (a); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 198.) On appeal, in reviewing a challenge to the sufficiency of the dependency court's jurisdictional findings, our power begins and ends with a determination as to whether substantial evidence exists, contradicted or uncontradicted, supporting the dependency court's determinations. We review the evidence in the light most favorable to the dependency court's findings and draw all reasonable inferences in support of those findings. (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969; *In re Basilio T.* (1992) 4 Cal.App.4th 155, 168.) Thus, we do not consider whether there is evidence from which the dependency court could have drawn a different conclusion but whether there is substantial evidence to support the conclusion that the court did

draw. (*In re Rubisela E*. (2000) 85 Cal.App.4th 177, 194–195; *In re Stephanie M*. (1994) 7 Cal.4th 295, 319.)

Section 300, subdivision (b) provides a basis for jurisdiction if the child has suffered, or there is a substantial risk the child will suffer, serious physical harm or illness caused by the parent's inability to provide regular care for the child because of the parent's mental illness, developmental disability or substance abuse. (*In re James R.* (2009) 176 Cal.App.4th 129, 135.) A jurisdictional finding under section 300, subdivision (b) requires "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) "Subdivision (b) means what is says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness." (*Id.* at p. 823; *In re Alysha S.* (1996) 51 Cal.App.4th 393, 399.)

In *In re Heather A.* (1996) 52 Cal.App.4th 183, the minor child Heather and her sister Helen were placed with their father and stepmother Ramona A. (*Id.* at p. 187.) Soon thereafter, Ramona reported that Father was physically abusing her, and that the children had witnessed several episodes of abuse. (*Id.* at pp. 187–188.) A psychologist testified that neither minor had been physically abused by Father, but they had been exposed to Father's abuse of Ramona, who suffered from battered woman's syndrome. (*Id.* at p. 189.) The dependency court sustained the petition under section 300, subdivision (b) although the children were not the ones being physically abused, they could see and hear the violence between Ramona and Father. (*Id.* at p. 192.) On appeal, the court rejected Father's argument that jurisdiction under subsection (b) was not met under the *Rocco M.* three-part test, finding instead that "domestic violence in the same household where the children are living *is* neglect; it is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect *causes* the risk." (*Id.* at p. 194.)

Here, the court found Mother had violent and assaultive behavior which rendered her unable to care for Son. She posed "a regular, consistent, and constant danger to any child by virtue of her inability to maintain herself in the community. She fights with everybody." Mother's temper could appear at any time and in the past she had demonstrated extremely violent and unpredictable behavior toward both Fathers. Mother was also in denial that she had any issues that needed addressing through reunification services. Thus, although there was no evidence of imminent physical danger to Son (who was removed from his Mother's care at age six weeks), his return to Mother would create a substantial risk of physical and emotional harm and there were no reasonable means to protect Son from Mother's unpredictable temper while in Mother's custody.

II. REMOVAL OF SON FROM MOTHER'S CARE

Mother challenges the removal of Son from her care, contending that there was insufficient evidence there was no reasonable means to protect Son without removing him from her home. She relies on the fact that Dr. Wirshing reported she had no functionally limiting major psychiatric condition, and there was no reason why she could not parent her children. We disagree.

Section 361, subdivision (c)(1), provides children shall not be removed from the home in which they are residing at the time of the petition unless there is clear and convincing evidence of a substantial danger to the children's physical health, safety, protection, or physical or emotional well-being and there are no reasonable means by which the children can be protected without removal. (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288.) "A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. [Citation.] The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. [Citations.]" (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136.) On appeal from a dispositional order removing a child from her parent, we apply the substantial evidence standard of review, keeping in mind that the trial court was required to make its order based on the higher standard of

clear and convincing evidence. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.)

Here, the record supports the removal order. Mother has a history of initiating extremely violent and unpredictable confrontations with others, including family members and neighbors. Thus, although Mother appeared to be able to care for Son's needs (in his first few weeks of life), her consistent and frequent inability to maintain normal and nonviolent relations with members of the community at large created a tangible risk of harm to Son, justifying his removal.

III. DENIAL OF REUNIFICATION SERVICES

Mother contends the dependency court erred in denying her reunification services because she did not present any current or past history of substance abuse or dependence, and she did not suffer from any functionally limiting major psychiatric condition. We disagree.[5]

Section 361.5, subdivision (b) provides that: "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (10) That the court ordered termination of reunification services for any siblings . . . of the child because the parent or guardian failed to reunify with the sibling . . . after the sibling . . . had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling . . . of that child from that parent or guardian."

There is a presumption in dependency cases that parents will receive reunification services. (*Riverside County Dept. of Public Social Services v. Superior Court* (1999) 71

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[5] Mother correctly points out that the court's failure to give her proper notice of her rights to file a writ challenging the termination of reunification services and setting of the section 366.26 hearing permits her to raise this issue on appeal. (§ 366.26, subd. (l); *In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1110.) The Department concedes this point.

Cal.App.4th 483, 487.) However, section 361.5, subsection (10) of subdivision (b) provides that no reunification need be ordered where the parent has failed to reunify with the dependency child's siblings, or where parental rights to a sibling have been terminated. In enacting subsection (10), "the Legislature has made the decision that in some cases, the likelihood of reunification is so slim that scarce resources should not be expended on such cases." (*Riverside County Dept. of Public Social Services v. Superior Court*, *supra*, at p. 488.) The right to reunification services in section 361.5, subdivision (a), does not accrue to a parent who has previously failed to reunify with a child unless the court finds it would benefit the dependent child to pursue reunification services with that parent. "Inherent in this subdivision appears to be a very real concern for the risk of recidivism by the parent despite reunification efforts." (*Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 751.)

Under section 361.5, subdivision (b)(10), the dependency court must find that the parent has not made a reasonable effort to treat the problem giving rise to the dependency proceedings in the first instance. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 842.) The "no reasonable efforts" clause provides a means of mitigating a harsh rule that could provide for termination simply based upon the parent's prior failure to reunify or the termination of parental rights. (*Ibid*.) In addition, even where the parent fits within the definition of section 361.5, subdivision (b)(10), under subsection (c) of section 361.5, the court may order reunification services where it is in the child's best interests. (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 64.) We will affirm the order denying reunification services if it is supported by substantial evidence. (*Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470, 474.)

Here, it is undisputed that Son's older siblings were removed from Mother's care and that she failed to reunify with them. Mother has made no effort to ameliorate the conditions underlying dependency jurisdiction over Son, nor has she demonstrated that it would be in Son's best interests to place him with her. Mother's persistent anger management issues, inability to interact in an appropriate manner in the community, and

her lack of insight into her problems put her squarely within section 361.5, subdivision (b)(10).

IV. TERMINATION OF PARENTAL RIGHTS TO SON

Mother contends the dependency court erred in terminating her parental rights to Son without finding that the section 366.26, subdivision (c)(1)(B)(i) exception applied. She contends she visited Son often and formed a bond with him. They would play and Mother would sing to him; Son would smile at her and make eye contact. We disagree.

Section 366.26 directs the juvenile court in selecting and implementing a permanent placement plan for a dependent child. The express purpose of a section 366.26 hearing is "to provide stable, permanent homes" for dependent children. (§ 366.26, subd. (b).) If the court has decided to end parent-child reunification services, the legislative preference is for adoption. (*In re Celine R.* (2003) 31 Cal.4th 45, 53 ["if the child is adoptable . . . adoption is the norm"]; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [once reunification efforts have been found unsuccessful, the state has a "compelling" interest in "providing stable, permanent homes for children who have been removed from parental custody" and the court then must "concentrate its efforts . . . on the child's placement and well-being, rather than on a parent's challenge to a custody order"].) When the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of six enumerated exceptions applies. (§ 366.26, subd. (c)(1)(B); see *In re Celine*, at p. 53 ["court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child"]; *In re Matthew C.* (1993) 6 Cal.4th 386, 392 [when child is adoptable and declining to apply one of the statutory exceptions would not cause detriment to the child, the decision to terminate parental rights is relatively automatic].)

To satisfy the parent-child exception to termination of parental rights in section 366.26, subdivision (c)(1)(B)(i), a parent must prove he or she has "maintained regular visitation and contact with the child and the child would benefit from continuing the

relationship." (§ 366.26, subd. (c)(1)(B)(i); see *In re Derek W.* (1999) 73 Cal.App.4th 823, 826 ["parent has the burden to show that the statutory exception applies"].) The "benefit" prong of the exception requires the parent to prove his or her relationship with the child "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 ["the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer"].) No matter how loving and frequent the contact, and notwithstanding the existence of an "emotional bond" with the child, "the parents must show that they occupy 'a parental role' in the child's life." (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418–1419.) The relationship that gives rise to this exception to the statutory preference for adoption "characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Moreover, "[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) We review for substantial evidence the juvenile court's findings the parent-child relationship exception is inapplicable. (See *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424–425 [in an "[a]dmittedly . . . very close case," trial court's conclusion was supported by substantial evidence and would not be disturbed].)

Here, the evidence establishes that Mother was nothing more than a friendly visitor to Son, who was removed from her custody at age six weeks and had been residing with adoptive parents since that time. Although his interactions with Mother were pleasant, there is no evidence she occupied a parental role in his life. On the other hand, Son had been with his proposed adoptive parents since his removal from Mother's custody and had been doing well in that placement. Given the preference for adoption in

this situation, where there is little benefit to the child in continuing the relationship with his or her parent and a stable adoptive home has been found, the dependency court did not err in terminating Mother's parental rights.

V. THE DEPARTMENT HAS NOT COMPLIED WITH THE NOTICE REQUIREMENTS OF ICWA

Mother contends the department failed to comply with the notice requirements of the ICWA because it failed to include complete information about the children's maternal grandmother on notices it sent to the Blackfeet and Choctaw tribes. On this ground, Mother asks this court to reverse the orders removing Son from her custody and terminating her parental rights to him and the Twins. The Department concedes it gave inadequate notice under the ICWA and accedes to reversal and conditional remand on that ground.

"The ICWA establishes minimum federal standards, both procedural and substantive, governing the removal of Indian children from their families. [Citation.] An 'Indian child' for purposes of the ICWA means 'any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.' [Citation.] The ICWA seeks to protect the interests of Indian children and promotes the stability and security of Indian tribes and families. [Citation.]" (*In re H. A.* (2002) 103 Cal.App.4th 1206, 1210.)

The ICWA requires a party seeking foster care placement of or termination of parental rights to an Indian child to notify the child's tribe of the proceedings. (25 U.S.C. § 1912(a).) A notice to a tribe must include, if known, the name of the child's grandparents and great grandparents; their current and former addresses; "maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information." (25 C.F.R. § 23.11, subds. (a), (d)(1); *In re C.D.* (2003) 110 Cal.App.4th 214, 225.) The department and dependency court have a duty to inquire about and if possible obtain the information. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) The notice provision is triggered "where

the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a); *In re Nikki R.*, *supra*, at p. 848.) "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice" by the tribe. (25 U.S.C. § 1912(a).) If the notice provision is not followed, an Indian child, parent, or the tribe "may petition any court of competent jurisdiction to invalidate such action . . . ." (25 U.S.C. § 1914; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 738.) The appellate court must then vacate the challenged orders and order a conditional remand for further proceedings that comply with the ICWA notice requirements. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111.) If after proper ICWA notice is given, the dependency court receives no information indicating the children are Indian children, its prior orders shall be reinstated. (*Ibid*.) If the court receives a tribal determination that the children are Indian children, the court must conduct new hearings in compliance with the ICWA. (*Id*. at pp. 111–112.)

Here, Mother informed the court that she believed she had Choctaw heritage on mother's side and Blackfeet on her father's. The department sent notice of the proceedings to the Choctaw Nation of Oklahoma, Jena Band—Choctaw, Mississippi Band of Choctaw Indians, the Blackfeet Tribe in Browning, Montana, and to the Secretary of the Interior and the Bureau of Indian affairs. But the notice failed to include the maternal grandmother's address or birthplace or the names of her parents, information that could have been obtained from the maternal grandmother herself, as she attended some of the hearings.

DISPOSITION

Appeal Nos. B219332 and B222013: The orders of the dependency court asserting jurisdiction over Son, removing him from Mother's custody, denying reunification services, and terminating parental rights to Son are reversed. The matter is remanded to the dependency court to conduct a limited hearing restricted to ordering DCFS to comply with the notice provisions of the ICWA. If after proper inquiry and notice no tribe indicates Son is an Indian child within the meaning of the ICWA, the dependency court shall reinstate its orders asserting jurisdiction over Son, removing him from Mother's custody, denying reunification services, and terminating Mother's parental rights to him. If a tribe determines that Son is an Indian child, the dependency court shall conduct new hearings in conformity with all federal and California ICWA provisions.

Appeal No. B219427: The order terminating Mother's parental rights to the Twins is reversed. The matter is remanded to the dependency court to conduct a limited hearing restricted to ordering DCFS to comply with the notice provisions of the ICWA. If after proper inquiry and notice no tribe indicates the Twins are Indian children within the meaning of the ICWA, the dependency court shall reinstate its order terminating Mother's parental rights to them. If a tribe determines that the Twins are Indian children, the dependency court shall conduct a new permanency planning hearing in conformity with all federal and California ICWA provisions.

NOT TO BE PUBLISHED.

JOHNSON, J.

I concur:

MALLANO, P. J.

CHANEY, J., Concurring and Dissenting.

I concur in the disposition reversing the juvenile court's orders. But in my view, the juvenile court erred in finding jurisdiction over K.K. (Son) under the "serious physical harm" provision of Welfare and Institutions Code section 300.[1]

The Los Angeles County Department of Children and Family Services (DCFS) sought jurisdiction only under subdivision (b) of section 300. Jurisdiction under that subdivision requires a showing of "three elements: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

The juvenile court had ample evidence from which to conclude Mother was chronically violent. She battered Father J. between 1997 and 2004, stabbed Father R. and hit him with a hammer in 2007, battered a neighbor and spat on a police officer in 2008, and was removed from a foster agency and a hospital in 2009 after becoming abusive.

There was also ample evidence that Mother had failed to reunify with her other children and in the three years she has been involved with the dependency system failed to complete a single parenting, drug education or domestic violence class, participate meaningfully in any group or individual counseling, or obtain a complete psychological evaluation, despite the extensive efforts of the department and juvenile court and removal of four of her children. Nothing indicates she intends to partake meaningfully of any services offered to help her reunify with Son.

But the record on appeal lacks any evidence suggesting Mother's propensity for abusing third parties physically endangered or will endanger Son. (See *In re Alysha S.* (1996) 51 Cal.App.4th 393, 398-399 [violence not affecting the minor does not establish failure to protect the minor].)

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1 Statutory references are to the Welfare and Institutions Code.

The juvenile court itself stated it could not find that Mother posed a substantial risk of physical danger. (The juvenile court's statement that mother "fights with everybody" finds no support in the record.) It is certainly possible to speculate about many possible harms to Son that might arise due to Mother's instability, but such speculation does not justify the court's exercise of jurisdiction. (*In re Janet T.* (2001) 93 Cal.App.4th 377, 389 [allegation that mother demonstrated numerous "mental and emotional problems" is insufficient to establish jurisdiction absent facts suggesting mother's problems endangered the children].)

No authority of which I am aware has upheld a finding of substantial risk of physical harm based on violent or abusive conduct exclusively involving third parties. *In re Heather A.* (1996) 52 Cal.App.4th 183 is factually dissimilar. Though it involved physical abuse by the minors' father exclusively against third parties, including the minors' stepmother, the court's finding that the third-party violence posed a substantial risk of physical danger to the children was supported by the stepmother's testimony that "[d]uring one of the incidents, Father smashed a glass vase and one of the minors cut her finger and foot on the glass and needed medical attention. In another incident, when the minors were approximately three years old, Father had pushed [Mother] on the floor and was hitting her, and Heather attempted to get Father off of [Mother]." (*Id.* at p. 188.) Here, all of the incidents of battery committed by Mother occurred before Son was born, and nothing suggests any child was present or exposed to any danger.

Similarly, in *In re Giovanni F.* (2010) 184 Cal.App.4th 594, the appellate court upheld jurisdiction though the father's violent conduct was directed only at the mother, not the minor. But there, unlike here, the violence collaterally involved the minor. Joel, the father, drove with one hand on the steering wheel while he hit and choked R.F., the mother, with his other hand. This placed the minor, Giovanni, a passenger, at substantial risk of suffering serious physical harm because of the "likelihood of a collision that could prove fatal." (*Id.* at p. 600.) "Moreover, on at least two other occasions Joel placed Giovanni at substantial risk of suffering serious physical harm inflicted nonaccidentally. After the violence in the moving car, Joel and R.F. struggled over Giovanni's car seat

while Giovanni was still in it. On an earlier occasion, while Linda was holding Giovanni, Joel physically attacked [the paternal grandmother]. The risk to Giovanni from Joel's violence on these occasions was increased by his history of violent attacks on R.F. and others, some of which occurred in Giovanni's presence . . . ." (*Id*. at p. 601; see also *In re Veronica G*. (2007) 157 Cal.App.4th 179, 181, 185-186 [father ramming "his truck into mother's car three times while mother and [the minor] were inside the car" constituted evidence that the minor was at substantial risk of serious physical harm]; *In re Basilio T.* (1992) 4 Cal.App.4th 155, 169 [violent conduct between the father and mother "which apparently involved the minors" supported subdivision (b) jurisdiction].)

In *In re E.B.* (2010) 184 Cal.App.4th 568, we upheld subdivision (b) jurisdiction based on violence directed solely at the mother by the father, even though the minors were not in the same room. But unlike here, when the violence occurred, the children were at least present in the house and heard the mother screaming. (*Id*. at p. 572.) We cited *In re Heather A., supra*, for the proposition that "'[D]omestic violence in the same household where children are living . . . is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.' [Citation.] Children can be 'put in a position of physical danger from [spousal] violence' because, 'for example, they could wander into the room where it was occurring and be accidentally hit by a thrown object, by a fist, arm, foot or leg . . . .'" (*Id.* at p. 576.)

In short, third party violence that does not involve the minor has never been held to present a danger to the minor for purposes of finding jurisdiction under subdivision (b). I agree that Mother's conduct is generally deplorable and potentially hazardous not only to those with whom she disagrees, but to herself. But no evidence suggests her inability to manage personal relationships with other adults physically endangers Son.

I agree reversal is necessary to provide notice under the Indian Child Welfare Act, but in addition I would order the juvenile court to dismiss the petition concerning Son.

CHANEY, J.